IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 7, 2009 Session

ROBERT ALAN AUSTIN v. AMANDA YVETTE AUSTIN

Appeal from the Circuit Court for Sequatchie County
No. 7833 Thomas W. Graham, Judge

No. M2008-01515-COA-R3-CV - Filed March 11, 2010

After the divorced mother of an eight year-old boy moved almost 100 miles away from the parents' home county, the father filed a petition to be designated as the child's primary residential parent in her place. The trial court found that there was no proof that the mother's move posed a threat of "specific and serious harm to the child," and accordingly concluded that the father did not meet the threshold requirement for modification of an established parenting arrangement. We reverse the trial court's order because a threat of specific and serious harm is not the correct standard to apply in modification proceedings. We find there was a material change of circumstances and remand for determination of the best interests of the child.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Michael Keith Davis, Dunlap, Tennessee, for the appellant, Robert Alan Austin.

Kathryn R. Leiderman, Jasper, Tennessee, for the appellee, Amanda Yvette Austin.

OPINION

I. MARRIAGE, DIVORCE AND RELOCATION

In 1998, Robert Alan Austin ("Father") and Amanda Yvette Austin ("Mother") married in Sequatchie County, Tennessee. Their son Robert Mason Austin ("Mason") was born on March 13, 2000. The parties separated in 2001. On May 30, 2002, Wife filed a

Complaint for Divorce in the Sequatchie County Circuit Court alleging irreconcilable differences, and asking that she be named as Mason's primary residential parent.

The trial court conducted a hearing on October 4, 2002 and granted the parties a divorce. The parties' marital dissolution agreement ("MDA") was incorporated into the final decree of divorce. A permanent parenting plan incorporated into the MDA made Mother the primary residential parent for Mason and awarded Father 144 days of residential time per year. Under the plan, Father was ordered to pay $336 per month in child support, a downward deviation from the guidelines amount to reflect the fact that Father was to exercise more than the "standard" 80 days of visitation per year. *See Hopkins v. Hopkins*, 152 S.W.3d 447, 450 (Tenn. 2004); Tenn. Code Ann. § 36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. 1240-2-4-.02(6).

The record indicates that after the divorce the parties got along well with each other for the most part, and were cooperative on matters affecting their child's well-being. Mother allowed Father to exercise even more visitation with Mason than was provided for in the parenting plan, to the extent that the child was spending approximately equal time with both parents. The parents of both Mother and Father lived in Sequatchie County, as did many other extended family members. Their proximity made it easier for Mother and Father to find babysitters for Mason when they both were at work.

After divorce, the parties tried to move on with their lives and to form new relationships. Father testified that he only dated one woman after the divorce and that he lived with her for two-and-a-half years before they married. He and his new wife, Charlyn Austin, have a daughter, Chelsea, who was born around August of 2007.

Mother had a more difficult time. She entered into a number of intimate relationships that didn't pan out, including a short-lived marriage to Kevin Snyder.[1] At the time of trial, she was involved in a serious relationship with Kelly Hollis, whom she planned to marry after her divorce from Mr. Snyder was finalized. Mother also experienced problems with her job. She had been working as a nurse practitioner for a Chattanooga gastroenterologist, Dr. Mackler. Mother testified that the doctor began having financial and other difficulties in his practice, that he cut her pay by $17,000 a year, failed to pay his bills, and wrote checks that bounced. The doctor's wife, who was also the business manager for his practice, admitted to the financial difficulties.

[1]Mother testified that she and Kevin Snyder married in September of 2006 and separated in December of 2006. He filed a complaint for divorce in April of 2007. The divorce was still pending at the time of the hearing of this case.

In any case, Mother decided to look for another job. She posted her resume in 2006, but then discovered that she was pregnant with the child of her estranged husband. She decided to temporarily remain in her job so she could keep her medical insurance until her child was born. She gave birth to a daughter on July 9, 2007.

Mother tried to find another job as a nurse practitioner in Sequatchie County and surrounding areas. Although she received some offers, she testified that none of them were suitable, either because of the amount of pay offered or because the hours were not compatible with her child care needs. Finally, she found a part-time job in Middle Tennessee as a nurse at the Nissan plant in Smyrna. She subsequently found a steadier position working in the Mt. Juliet office of Dr. West, an internist.

Mother left her employment with Dr. Mackler in October of 2007. Shortly thereafter she moved into a house in Mt. Juliet that she and Mr. Hollis rented together. Mr. Hollis testified that he has a good job in Nashville with Willis Corroon, so the Mt. Juliet residence is only a short commute from his job. Mr. Hollis' parents also moved into the house on a temporary basis. By agreement of the parties, Mason remained in Sequatchie County under Father's care so he could finish up the school year at Bright School, a private school in Chattanooga he had been attending. The parties arranged for Mason to spend weekend visitation with Mother, with both parties driving to Cookeville to transfer the child between them.

II. A PETITION FOR MODIFICATION

Father filed a petition to modify the existing parental arrangements on February 11, 2008. He alleged that Mother's move to Mt. Juliet and her plan to bring Mason to live with her would be disruptive to the child's upbringing and would expose him to an imminent threat of emotional harm. Father accordingly asked for both immediate and permanent relief. He asked the court to issue an *ex parte* temporary restraining order prohibiting Mother from removing the child's primary residence from Sequatchie County and also to name him as Mason's primary residential parent in accordance with a proposed parenting plan attached to his petition. The trial court granted the temporary restraining order, and after a preliminary hearing, it allowed Mason to remain with Father pending the final hearing, provided that Father pay for Mason's private school tuition.

On April 15, 2008, Mother filed a response to Father's petition in which she denied that her move posed any threat of harm to the child, or that it "constituted a substantial and material change of circumstances sufficient to justify a change in the original custody order." Her response also included a contempt claim. She asserted that Father failed to pay a one-

half share of some of Mason's medical expenses, as he was required to do by the parenting plan, and that the amount of such unpaid expenses was "not less than $1750.03."

The final hearing of this case was conducted over two days, on April 16 and 17, 2008. The parties both testified, as did Father's current wife, Mother's boyfriend, the wife of Mother's former employer, and Mason's second grade teacher. The proof overwhelmingly showed that Mason was a happy and well-adjusted child, and that he was a gifted student who was well-liked by his peers. Father's wife and Mother's boyfriend both testified that they had established close relationships with Mason.

Each party acknowledged that the other was a good parent, but both also tried to develop proof that he or she was in the best position to serve in the role of Mason's primary residential parent. Mother asserted that she is better attuned to Mason's educational needs than is Father, and that she has been more involved in his day-to-day school activities and extracurricular activities. Testing revealed that Mason was reading at a fifth grade level when he began second grade, and Mother contended that as a gifted student he should be given the opportunity to go to a school with high enough academic standards to challenge his abilities. She testified that except for the amounts paid by Father pursuant to the last court order, she had paid all his tuition at the highly-regarded Bright School. She also testified that Donelson Christian Academy near Mt. Juliet likewise offered high academic standards, and that she believed it would be a good school for Mason to attend.

Father testified that there were several excellent public schools within a reasonable distance of his home in Sequatchie County and insisted that he has also been involved in Mason's education. He testified that both he and his wife check Mason's homework every night he is with them, that he coached Mason's tee-ball team for two years, and that he has also helped coach Mason's football team. He noted that both parties and Mason have deep roots in Sequatchie County, with many friends and extended family living there. He argued that to be separated from them would be detrimental to the child's welfare. Father's attorney also suggested that Mother could not offer Mason the stability that Father could, citing her testimony as to the short-lived intimate relationships she had entered into after the parties' divorce, and the fact that she had moved frequently from one residence to another.[2]

At the conclusion of proof, the attorneys for both parties presented closing arguments which focused on the question of whether or not it was in Mason's best interest to move to Mt. Juliet to live with Mother. The court then ruled from the bench. The court announced

[2]Mother testified that she moved six or seven times after the divorce. Some of her moves were between homes owned by her mother, a real estate investor. Prior to her move to Mt. Juliet, all were within a five or ten mile radius of Dunlap, the Sequatchie County seat.

that "I view this case a little bit different legally than I think Counsel does." The court stated that although the case was styled as a modification, it really involved a removal, and that the controlling precedent in such cases could be found in *Aaby v. Strange,* 924 S.W.2d 623, 627 (Tenn. 1996). Citing language from that case, the court stated that there was no proof that Mother had chosen to move to Mr. Juliet out of a vindictive motive and,

> In my view the way the statutes are now, this is not a question of the best interest of the child absent a showing of specific and serious harm to the child. And that has not and probably can't be established in this case. So I think the move has to be allowed under the law.

The court accordingly did not address Mason's best interest, but determined that Mother should remain Mason's primary residential parent. Because Mother's change of residence made the previous parenting schedule unworkable, the court adjusted the visitation schedule to allow Mason to remain with Mother on weekdays during the school year, and to spend increased time with Father during Spring and Fall breaks and during the Summer. The court's determination was memorialized in an order dated June 10, 2008. This appeal followed.

III. ANALYSIS

A. RELOCATION AND PARENTING PLAN MODIFICATION

The general standard of review in cases tried by the trial court without the participation of a jury is that the trial court's findings of fact are reviewed *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Blair v. Brownson*, 197 S.W.3d 681, 684 (Tenn. 2006). Questions of law are reviewed *de novo* with no presumption of correctness. *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

Questions of custody or the designation of a primary residential parent often hinge on the parties' credibility, so appellate courts are reluctant to second-guess trial judges who have observed the witnesses and assessed their credibility. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997); *Gilliam v. Gilliam*, 776 S.W.2d 81, 84 (Tenn. Ct. App.1988). We accordingly decline to disturb such decisions unless they are based on a material error of law or the evidence preponderates against the court's factual findings. *See Hass v. Knighton,* 676 S.W.2d 554, 555 (Tenn.1984); *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). The trial court's characterization of this case as a removal case and its reliance on the case of *Aaby v. Strange* are just such material errors of law.

Our Supreme Court declared in *Aaby*, that it wished to clarify "the law of removal," that is, the standards the courts must follow in determining whether a custodial parent should be allowed to move with a minor child to a different jurisdiction when the non-custodial parent objects. *Aaby v. Strange*, 924 S.W.2d at 625. The court noted that prior cases addressing those situations resulted in shifting standards or in standards that were too vague for consistent application. *See Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993); *Seessel v. Seessel,* 748 S.W.2d 422 (Tenn. 1988); *Walker v. Walker,* 656 S.W.2d 11 (Tenn. Ct. App. 1983).

The court announced that it had decided that such a move should be allowed unless the non-custodial parent can show that "the custodial parent's motives for moving are vindictive - that is, intended to defeat or deter the visitation right of the non-custodial parent." The court also declared that if the removal posed "a specific, serious threat of harm to the child," the non-custodial parent retained the option of petitioning for a change of custody based on a material change of circumstances.

The court's decision in *Aaby v. Strange* was the controlling law in removal cases until 1998, when our legislature enacted the parental relocation statute, Tenn. Code Ann. § 36-6-108 [Acts 1998, ch. 910, § 1]. That statute sets out specific procedures for parties to follow and standards for the courts to apply in removal cases. Those standards differ in important respects from the standards set out in *Aaby v. Strange*. Among other things, if the parents are "spending substantially equal intervals of time with the child," no presumption arises for or against allowing the proposed move, and "the court shall determine whether or not to permit the relocation of the child based upon the best interest of the child." Tennessee Code Annotated § 36-6-108 has superceded *Aaby v. Strange*. However, we believe neither *Aaby* nor the relocation statute applies to the case before us.

Tennessee Code Annotated § 36-6-108(a) specifically limits the scope of the statute to those situations where a primary residential parent "desires to relocate outside the state or more than one hundred (100 miles) **from the other parent** within the state." In the present case, Mother testified that she used her odometer to measure the distance between Father's residence in Sequatchie County and her new home in Mt. Juliet, and came up with 97.7 miles. She also traced the route on Mapquest, which recorded a distance of 98.71 miles. A Mapquest printout is included in the record on appeal. Mother's move is therefore just short of the statutory threshold, and, consequently, the requirements and standards of Tenn. Code Ann. § 36-6-108 are not applicable.

B. A CHANGE OF CIRCUMSTANCES

Instead, this case involves a petition to modify an existing parenting arrangement. A parenting arrangement may be modified in certain situations, and both the legislature and the courts have addressed the requirements for a such modification, recognizing the fact that the circumstances of children and their parents change, sometimes requiring changes in the existing parenting arrangement. When a petition to change primary residential parenting time is filed, the parent seeking the change has the burden of showing that a material change in circumstances has occurred which makes a change in custody in the child's best interest. *Blair v. Badenhope*, 77 S.W.3d 137, 148 (Tenn. 2002); *In re M.J.H.*, 196 S .W.3d 731, 744 (Tenn. Ct. App. 2005).

A decision on a request for modification of a parenting arrangement requires a two-step analysis. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003). A party petitioning to change an existing custody order must prove both (1) that a material change of circumstances has occurred and (2) that a change of custody or residential schedule is in the child's best interest. *Kendrick v. Shoemake*, 90 S.W.3d 566, 575 (Tenn. 2002). Only after a threshold finding that a material change of circumstances has occurred is the court permitted to go on to make a fresh determination of the best interest of the child. *Kendrick*, 90 S.W.3d at 569; *Badenhope*, 77 S.W.3d at 150; *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn.Ct.App.2006).

As to the requirement of a material change of circumstances, the Tennessee Supreme Court has stated:

> Although there are no bright line rules as to whether a material change in circumstances has occurred after the initial custody determination, there are several relevant considerations: (1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way.

Cranston, 106 S.W.3d at 644 (citing *Kendrick*, 90 S.W.3d at 570). A recent formulation of the standard by this court is "[a]s a general rule, 'changed circumstances' include any material change of circumstances affecting the welfare of the child including new facts or changed conditions which could not be anticipated by the former decree." *In re T.C.D.*, 261 S.W.3d 734, 744 (Tenn. Ct. App. 2007) (*citing Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn. Ct. App.1993).

The General Assembly has also addressed the question of what constitutes a material change of circumstances:

> (B) If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.
>
> > (i) In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.
> >
> > . . .

Tenn.Code Ann. § 36-6-101(a)(2).[3]

The statute specifically negates the requirement that a substantial risk of harm be proved before the court can change the custody of a child or the designation of a primary residential parent. Instead, a material change of circumstances must be proved by a preponderance of the evidence. If a material change of circumstances is shown to exist, the trial court is to proceed to the next step of the analysis: whether modification of the existing parenting arrangement is in the child's best interest. *Cranston*, 106 S.W.3d at 644; *Kendrick*, 90 S.W .3d at 569; *Curtis*, 215 S.W.3d at 840. That determination requires consideration of a number of factors, including those set out in Tenn.Code Ann. § 36-6-106 (a) (factors to consider in custody determination) and/or Tenn.Code Ann. § 36-6-404 (b) (factors to consider in establishing a residential schedule as part of a parenting plan).

In the present case, Mother concedes that her decision to move to Mt. Juliet was made after the final decree of divorce was entered naming her as Mason's primary residential

---

[3]Subsection (B) of Tenn. Code Ann. § 36-6-101(a)(2) applies to the designation of a different primary residential parent for the child in question, while Tenn. Code Ann. § 36-6-101(a)(2)(C) applies to less drastic modifications of "a residential parenting schedule." *Massey-Holt v. Holt*, 255 S.W.3d 603, 608 (Tenn. Ct. App. 2007). Further, "a material change of circumstances" under Section (C) sets out a lower threshold for modification than does a material change of circumstances under section (B). *Id.*; *See also Scofield v. Scofield,* No. M2006-00350-COA-R3-CV, 2007 WL 624351 at *3 (Tenn. Ct. App. Feb. 28, 2007)(no Tenn. R. App. P. 11 application filed). Section (B) was added to Tenn. Code Ann. § 36-6-101(a) and became law on July 15, 2002 [Acts 2002, ch. 859 § 1] .

parent and that such a move was not known or reasonably anticipated when the decree was entered. She insists, however, that the change does not affect Mason's well-being, since he is such a happy and well-adjusted child, and since she has now achieved the domestic and occupational stability that eluded her in the years immediately following the divorce. For his part, Father cites the unstable relationships Mother entered into after divorce and prior to her current move.

Not every change in the circumstances of either a child or a parent will qualify as a material change in circumstances. "The change must be 'significant' before it will be considered material." *In re T.C.D.*, 261 S.W.3d 734, 744 (Tenn. Ct. App. 2007). Mother has moved to a new residence almost a hundred miles away from the community where Mason has lived all his life, where he has strong relationships with relatives on both sides of the family.[4] Mother has moved to a different school system and intends to enroll Mason in a new private school.

Mother's move has rendered the existing parenting plan unworkable. When the parties lived in the same county, with family members close by, an informal arrangement providing Father more time with the child and ensuring stable child care services was workable and working. However, Mother's move has made the existing plan, and certainly the parties' informal arrangement, unworkable. Accordingly, Father has demonstrated a material change of circumstances. *In re T.C.D.*, 261 S.W.3d at 744.

This holding, however, does not necessarily mean that Father should become Mason's primary residential parent, but merely that if Father wishes to pursue the matter, the trial court must take the next step of determining the best interest of the child in accordance with the relevant statutory factors. In considering Mason's best interest, the trial court may take proof as to events and circumstances that have occurred since the court's last hearing.

C. MEDICAL EXPENSES

Mother raises a separate issue on appeal related to Mason's medical and dental expenses. She notes that the parenting plan adopted in October of 2002 included a provision that the costs of Mason's medical care which were not covered by insurance would be

[4]If the move had been just three miles further, then the removal statute, Tenn. Code Ann. § 36-6-108, would have applied, and in light of the almost equal division of parenting time between Mother and Father, it appears likely that the trial court would have been able to decide whether a change of custody was warranted based on the best interest of the child, without even having to consider whether Father had proved a material change of circumstance.

equally divided between the parties. At trial, Mother tried to submit proof that Father owed her about $1,750 because he had failed to pay his full share of those expenses. The trial court ruled that the principal of laches applied, and it declined to take proof involving any medical bills more than two years old. Mother then filed an affidavit as to the medical bills she paid less than two years before trial, and the court awarded her $502.04 in its final order.

Mother argues on appeal that the trial court's decision unfairly encourages contempt of orders to pay medical bills in situations like this one. She reasons that the attorney fees, court costs and the expenses involved in filing a separate pleading for a small sum would outweigh the benefit of a judgment, if one is even recovered. Mother asserts that as a result of the cost/benefit predicament, it makes more sense for parties in domestic cases where the claim is for a relatively small amount of money to simply wait until other matters are brought before the court, and to assert such a claim at that time. She concludes that "[i]t is unfair and unjust to forgive a clear court-ordered obligation simply because it was not economically feasible for the obligee to file a separate contempt action at an earlier date." We believe Mother's argument has merit, but there is an even more fundamental reason to allow her claim.

Laches is an old and well-established principle of equity that allows a court not to enforce a stale demand where a party has slept upon his or her rights for an unreasonably long time. *Saad v. Nashville Thermal Transfer Co.*, 715 S.W.2d 41, 46 (Tenn. 1986); *Frye v. Postal Employees Credit Union*, 713 S.W.2d 324, 326 (Tenn. Ct. App. 1986). Part of the rationale for the application of laches is that an unreasonable lapse of time can result in loss of evidence, the fading of memory, and the death of witnesses, to the prejudice of the defendant, and can make it impossible for the trial court to pronounce a decree with confidence. *Brown v. Ogle*, 46 S.W.3d 721, 726 (Tenn. Ct. App. 2000).

Because the facts and equities of individual cases may vary so widely, our courts have stated that the application of the doctrine lies within the discretion of the trial court, and that the trial court's decision will not be reversed except upon a showing of abuse of that discretion. *Saad v. Nashville Thermal Transfer Co.*, 715 S.W.2d at 46: *Hannefield v. Fairfield Communities,* 651 S.W.2d 222, 228 (Tenn. Ct. App. 1983). At the same time, there are cases holding that if the plaintiff can show a valid excuse for the delay, then laches does not apply. *Brown v. Ogle*, 46 S.W.3d at 726.

More importantly, there are numerous cases that stand for the proposition that the length of time that has elapsed is not a determinative test as to laches, but rather whether the party relying on laches as a defense has been prejudiced by the delay. *Murphy v. Emery*, 629 S.W.2d 895, 898 (Tenn. 1982); *Brown v. Ogle*, 46 S.W.3d at 726; *Dement v. Kitts*, 777 S.W.2d 33, 35 (Tenn. Ct. App. 1989); *Lane v. Associated Housing Developers*, 767 S.W.2d

640, 644 (Tenn. Ct. App. 1988); *Freeman v. Martin Robowash, Inc*., 457 S.W.2d 606, 611 (Tenn. Ct. App. 1970).

Although Father filed a reply brief in order to respond to Mother's claim for unpaid medical bills, he does not allege that he had been prejudiced by her delay in asserting his failure to pay them. We therefore hold that the trial court erred in limiting Mother's potential recovery as it did, and we direct the trial court on remand to allow her to present evidence of unpaid medical bills dating back to the court's adoption of the first parenting plan following the parties' divorce.

IV. CONCLUSION

The order of the trial court is reversed. We remand this case to the Circuit Court of Sequatchie County for a determination of the best interest of Mason Austin and for any other proceedings necessary. Tax the costs on appeal to the appellee, Amanda Yvette Austin.

PATRICIA J. COTTRELL, P.J., M.S.